(2)

No. 00-1406

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Americans with Disabilities Act permits an employer to deny a job to an individual with a disability who is able to perform the essential functions of a job and who poses no threat to the health or safety of others, but whom the employer believes will be harmed by the job at issue.

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STATEMENT

1. This case involves an employer's admittedly disability-based decision to exclude an employee from the workplace based solely on the paternalistic fear that the employee would suffer harm in the future if he continued in his employment. Respondent Mario Echazabal worked at Chevron's oil refinery in El Segundo, California from 1972 until 1996 (leaving for three years between December 1975 and January 1979). Pet. App. 2a; C.A. E.R. 328.[1] Throughout this period of time, respondent worked primarily in the coker unit. Pet. App. 2a. In this job, respondent was exposed to hydrocarbon liquids and vapors, acid, caustic refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach. C.A. E.R. 159, 333, 537-538.

Respondent never worked directly for Chevron during this time period, but rather performed his job through various maintenance contractors. C.A. E.R. 328. In 1992, respondent applied for a job directly with Chevron in the same coker unit in which he had been working for the contractors. Pet. App. 2a. Although respondent received a conditional job offer from Chevron, the offer was rescinded following a pre-employment physical. *Ibid.* Based on blood test results from the physical examination, indicating that respondent's "liver was releasing certain enzymes at a higher rate than normal level," Chevron's physician concluded that respondent's liver

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[1] Because this case arises on review of the district court's grant of summary judgment to the petitioner, the record must be viewed in the light most favorable to the respondent.

"might be damaged by exposure to the solvents and chemicals present in the coker unit." *Ibid.*

Following his rejection by Chevron, respondent continued to perform his same job duties in the same refinery for Chevron's maintenance contractor. *Ibid.* Based on the pre-employment physical, however, respondent sought treatment from his own doctors. C.A. E.R. 329. In approximately 1993, respondent's doctor diagnosed him as having chronic hepatitis C. Pet. App. 3a; C.A. E.R. 398. The majority of people with chronic hepatitis C do not develop symptoms such as fatigue or liver failure for many decades. C.A. E.R. 321. Indeed, respondent remained asymptomatic from the time of his diagnosis to his termination in 1996. C.A. E.R. 393, 394, 400.

Respondent's blood tests not only revealed abnormal enzyme test results (which indicate an inflammation of the liver and, hence, a diagnosis of chronic hepatitis C), but also revealed that respondent had normal levels of albumin and prothrombin. C.A. E.R. 322-323. Under established medical practice at that time, such results indicate that a liver is functioning properly (even though it may be inflamed due to the hepatitis and thus manifest increased enzyme levels), and therefore, that it is fully capable of filtering toxic materials. *Ibid.* Based on respondent's normal test results, and having reviewed the "GO-308" form describing the physical and environmental conditions in respondent's workplace, respondent's physician sent a letter to Chevron in April 1993 stating that there should be "no restriction on [respondent's] activity at work as outlined by the working condition sheet GO-308." C.A. E.R. 394.

Because his doctors placed no restrictions on him, respondent continued to work in the oil refinery's coker unit. C.A. E.R. 330. His enzyme levels continued to be high (indicating that he did, indeed, have *chronic* hepatitis C), and his albumin and prothrombin levels continued to be normal, indicating that his liver was continuing to function normally. C.A. E.R. 322-323. Thus, in 1993 and 1994, respondent's physician sent Chevron letters stating that respondent could perform his job without limitations, and appended the relevant blood tests. C.A. E.R. 392-399.

In 1995, respondent again applied to work directly for Chevron at the coker unit, this time in a "plant helper" position. Pet. App. 3a. Again, respondent received a conditional job offer from Chevron that was rescinded after a pre-employment physical. *Ibid.* Despite the fact that this physical examination revealed identical medical information that Chevron had had in its possession for three years, that accepted medical knowledge at the time indicated that an individual with such blood results has a normally functioning liver that will expose such an individual to no greater risks than others, that respondent's physicians had, over a period of three years, informed respondent he could continue in his job without risk, and that respondent had, indeed, suffered no reduction in liver capacity over the previous three years, Chevron's physician, Dr. McGill, decided that "further exposure to hepatotoxic chemicals and solvents would further damage [respondent's] already reduced liver capacity and seriously endanger his health." C.A.

E.R. 81.[2] Chevron accordingly withdrew respondent's conditional job offer. Pet. App. 3a.[3]

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[2] In fact, while respondent's enzyme tests indicated he had an inflamed liver, there was no evidence that respondent had "reduced liver capacity." See C.A. E.R. 324 ("While it is true that Mr. Echazabal has abnormal liver enzyme levels, those enzyme levels do not reflect reduced liver function."). Two experts who later reviewed the same information held by Chevron's physician concluded that Dr. McGill's opinion "contradict[ed] medical research in this area," C.A. E.R. 323; that "[respondent's] liver is as capable as detoxifying or metabolizing toxins that enter his body as is any other person," C.A. E.R. 325; and that "[respondent] is not at risk by virtue of the fact that Chevron maintains these chemicals in the Refinery/coker," C.A. E.R. 314.

[3] Petitioner erroneously states that "[t]he Ninth Circuit held that Echazabal was 'qualified' for the plant helper job despite the fact that *Echazabal's and Chevron's doctors agreed that the substances he would be exposed to on the job would harm or kill him.*" Pet. 13 (emphasis added). In fact, over a period of three years, Echazabal's doctors had consistently informed both Echazabal and Chevron that Echazabal could continue to work in the coker unit with no risk of harm to his liver. A letter from Dr. Weingarten (one of respondent's doctors) to Dr. McGill concludes with an ambiguous statement that "exposure to hepatotoxic hydrocarbons" is "recommended not to be the case." C.A. E.R. 195. There is no evidence that Dr. Weingarten was provided with accurate information regarding the concentration or exposure levels of substances to which respondent would be exposed in the refinery. C.A. E.R. 497-499, 510. Dr. Weingarten's general statement that "exposure to hepatotoxic hydrocarbons" is "recommended not to be the case," is a far cry from "agree[ing] that the substances [respondent] would be exposed to on the job would harm or kill him." Pet. 13.

Several weeks after petitioner rescinded respondent's conditional job offer, it informed the maintenance contractor for whom respondent was working that respondent was to be immediately removed from the refinery or be provided a job that "eliminate[d] his exposure to solvents/chemicals." Pet. App. 3a (internal quotation marks in original). Respondent was removed from his job and shortly thereafter became unemployed. Pet. App. 3a.

2. Respondent filed suit against petitioner in California state court. The complaint alleged, *inter alia*, that petitioner's refusal to hire respondent – and its directive to its contractor to remove respondent from the refinery – violated the Americans with Disabilities Act and California's Fair Employment and Housing Act (FEHA). Pet. App. 33a. Petitioner removed the case to the District Court for the Central District of California, Pet. App. 33a, and moved for summary judgment. Petitioner conceded that its adverse employment actions rested solely on the fact that respondent had hepatitis C, and it "d[id] not challenge that [respondent] has a disability under the FEHA [or] ADA." Pet. App. 46a n.6. It rested its defense entirely on the ground that respondent would pose a "direct threat" to himself if he continued to work in the refinery. Pet. App. 46a.

The district court concluded that respondent had "presented evidence raising a genuine issue as to whether the position of plant helper would, in fact, have posed [ ] a direct threat to Echazabal's liver condition or overall health," and that respondent had "presented evidence raising a genuine issue that despite elevated liver enzymes, [respondent's] liver function was normal, and

that the substances to which he would be exposed in the position of plant helper posed no greater danger to Echazabal than to other workers." Pet. App. 48a. Nevertheless, the district court concluded that the relevant issue was "not whether Chevron was in fact objectively *correct* in its determination that Echazabal's continued employment at the refinery posed a direct threat to his health," but rather "whether Chevron was reasonable in its determination that the employment of Echazabal presented a direct threat to the [respondent.]" Pet. App. 52a. The court held that respondent had failed to present "admissible evidence raising a genuine issue of material fact" as to whether Chevron had, in fact, not been reasonable in its determination. *Id.* Accordingly, the district court granted summary judgment to petitioner. *Ibid.*

3. On appeal, respondent argued that the district court had misapplied this Court's teachings that determinations regarding risk must be based on "objective, scientific information available" to a physician and others in his or her profession, and that a physician's belief that a significant risk exists, "even if maintained in good faith," does not relieve the decisionmaker of liability if that belief is unreasonable in light of the then-existing state of medical science. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); see also *Lowe v. Alabama Power Co.*, 2001 WL 286612 at *3-*4 (11th Cir. Mar. 23, 2001) (relying on this aspect of *Bragdon* to reverse grant of summary judgment to employer where the safety risk judgment made by the employer's physician was not based "on particularized facts using the best available objective evidence"). However, the court of appeals saw no need to reach respondent's argument that Chevron's physicians had arrived at

a demonstrably incorrect conclusion – one wholly inconsistent with basic medical knowledge available at the time – regarding the risk that respondent's continued employment would pose.

Rather than reach this fact-specific question, the court of appeals found a more basic *legal* flaw in petitioner's argument. The court held that the ADA's "direct threat" defense does not apply to employees who pose a direct threat solely to their own health or safety, and not to the health or safety of other persons. The court relied on the plain text of the "direct threat" provision, which permits an employer to exclude an employee who "pose[s] a direct threat to the health or safety of *other individuals* in the workplace," 42 U.S.C. § 12113(b) (emphasis added), but makes no mention of risks to the employee himself. Pet. App. 6a-7a. The court found additional support in the statute's legislative history, which consistently discusses the "direct threat" defense in terms of risks that individual employees might pose to others rather than to themselves. Pet. App. 7a-9a. Finally, the court found the congressional decision to bar employers from making paternalistic decisions to exclude people with disabilities from employment opportunities to be consistent with the similar Congressional decision to bar employers from excluding women from employment opportunities based on a concern for a female employee's health or safety. See *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977); Pet. App. 9a-10a.

Although a regulation of the Equal Employment Opportunity Commission (EEOC) includes a "threat to self" in the "direct threat" defense, the court of appeals

concluded that the regulation was inconsistent with the "unambiguously expressed intent of Congress," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), and hence invalid. Pet. App. 12a. The court also rejected Chevron's argument that the purported risk the job posed to his health rendered respondent not "qualified" to perform the "essential functions" of his job. See 42 U.S.C. § 12111(8) (defining "qualified individual with a disability"). "[N]ot posing a risk to one's own health or safety," the court concluded, "cannot in itself constitute an essential job function." Pet. App. 17a. In this case, the court concluded, "Chevron has never contended that the risk Echazabal allegedly poses to his own health renders him unable to perform [the] duties [of the coker unit job]." *Ibid.*

Although the original opinion of the court of appeals, issued on May 23, 2000, indicated a unanimous panel vote, the court issued an order four months later amending that opinion to include a dissent by Judge Trott. Pet. App. 2a. Applying the EEOC regulation, Judge Trott argued that petitioner could justify its actions on the ground that respondent's continued employment would pose a direct threat to his own health or safety. Pet. App. 22a-23a.

REASONS FOR DENYING THE WRIT

The decision below addressed a very specific (and, for all that appears from the cases, infrequently occurring) situation: A case in which an employer denied an individual a job based solely on the employer's purely

paternalistic belief that the job would be dangerous to the individual's own health. Petitioner has neither alleged nor presented evidence that respondent's medical condition rendered him unable to *perform the tasks required for the job*, or that *other* individuals would also have been at risk as a result of the respondent's medical condition. Petitioner argues only that it was entitled to refuse to hire respondent (and to direct its contractor to fire him) based on its own conception of respondent's best interest. In this narrow context, the court of appeals concluded that the ADA provides no defense to petitioner's concededly disability-based adverse employment actions. There is no serious split in the circuits as to whether the ADA permits an employer to raise a "threat to self" defense in this type of case. Indeed, the only *arguable* conflict is with a five-year-old, two-page *per curiam* opinion in which the basic legal question does not appear to have been contested. That is hardly the kind of deep and abiding split in the circuits that cries out for this Court's review.

Moreover, the opinion below rests firmly on the language of the statute, see 42 U.S.C. § 12113(b); the indications in both the statutory findings and the legislative history that paternalistic denials of opportunities to people with disabilities were a principal *target* of the ADA, see 42 U.S.C. § 12101(a)(5); H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 74 (1990); and the longstanding principle that an employer may not justify intentional discrimination against members of a protected class on the basis of paternalistic concerns for class members' own safety, see *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). Because the lower court's opinion in this case

does nothing more than apply to the ADA the principles that *Dothard* and *Johnson Controls* applied in the context of gender discrimination under Title VII of the Civil Rights Act of 1964, petitioner's suggestion that it will lead to "absurd results" and create "debilitating practical problems in the workplace" (Pet. 12, 21) (internal quotation marks omitted) is particularly ill-taken. This Court rejected many of the same arguments in *Johnson Controls*. Particularly given the extremely small number of reported cases in which employers have sought to justify disability discrimination under the ADA based solely on the risk an employee allegedly poses to him- or herself, petitioner's prediction that the court of appeals' decision will lead to dire practical consequences is entirely unwarranted and provides no basis for this Court's intervention.

I. THIS CASE IMPLICATES NO SIGNIFICANT CONFLICT IN THE CIRCUITS WARRANTING THIS COURT'S INTERVENTION

A. There Is No Serious Conflict Regarding Whether The Statutory Defense For "Direct Threat To Others" Encompasses An Employee's Direct Threat To His Own Safety

Title I of the Americans with Disabilities Act permits an employer to defend against a claim of disability discrimination on the ground that the plaintiff "pose[s] a direct threat to the health or safety of *others* in the workplace." 42 U.S.C. § 12113(b) (emphasis added). Applying the general principle that *expressio unius est exclusio alterius*, the court of appeals concluded that this provision

does not permit an employer to defend against a claim of disability discrimination on the ground that the plaintiff poses a direct threat to *his or her own* safety. Pet. App. 6a-7a. Contrary to petitioner's contention (Pet. 16-17), this straightforward reading of the statutory text creates no significant conflict with the rulings of other circuits.

Petitioner correctly notes that several cases in various circuits have parroted the EEOC's statement that the direct threat defense embraces "significant risk[s] of substantial harm to the health or safety of *the individual* or others." 29 C.F.R. § 1630.2(r) (emphasis added). Several other employment discrimination cases brought under the Rehabilitation Act have made similar statements (Pet. 19-20). But those cases create no meaningful conflict with the decision below, because they did not involve instances in which an employer sought to justify disability discrimination solely on the basis of the plaintiff's alleged threat to him- or herself.

In all but one of these cases (and the employer could probably have made such an assertion in that one) the employer asserted, and the court accepted, that the plaintiff posed a significant risk to *others in the workplace* as well. See *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1295 (10th Cir. 2000) ("Plaintiff was not a 'qualified person' to work in a position as a blaster because the defendants rightly considered that he was a direct threat to others in the workplace."); *LaChance v. Duffy's Draft House*, 146 F.3d 832, 836 (11th Cir. 1998) (stating that "LaChance's loss of consciousness was not only a danger to himself, but due to the working environment, was a danger to others as well" and concluding that there was

"no genuine issue of material fact as to whether LaChance was a direct threat to others"); *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (noting that the ADA "defines a direct threat as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation" and concluding that "a driver with insulin dependent diabetes is not otherwise qualified because his medical condition presents a genuine substantial risk that he could injure himself or others") (internal quotation marks omitted); *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (same result under the Rehabilitation Act, as to both insulin-dependent diabetes and impaired vision); *Chiari v. City of League City*, 920 F.2d 311, 315-316 (5th Cir. 1991) (stating that "[t]he City's sole justification for maintaining that Chiari was not capable of doing the job was its concern that his loss of balance would endanger him and others working with him" and noting that Chiari's own expert "agreed with the conclusions reached by [the City's experts]: that Chiari could not move adequately to be a construction inspector and that it was possible that he could be a danger to others").[4]

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[4] Two of the Rehabilitation Act cases on which petitioner relies do not involve claims of *employment* discrimination at all, but rather involve claims that *universities* discriminated against *students* on the basis of asserted safety risks. See *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (university's refusal to permit student with heart condition to play on the school's basketball team); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981) (university's refusal to permit student with psychiatric disability to matriculate as medical student). Because this case involves an interpretation of Title I of the ADA – a statute whose application is limited to employment

Indeed, petitioner points to only *one* court of appeals opinion that even purports to involve a pure threat-to-self case. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996) (*per curiam*). But that eight-paragraph *per curiam* opinion does not create any clear or significant conflict with the decision here, for two reasons. First, the question whether the ADA permits an employer to exclude an individual with a disability based on the risk he poses to himself does not appear to have been contested by the parties in *Moses*. For all that appears in the court's brief opinion, the plaintiff did not challenge the employer's argument that it was permitted to fire him if he posed a risk to himself; he appears to have argued

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relationships – these cases present no conflict with the decision below. Unlike employers in their relationships with employees, schools routinely act paternalistically toward their students. A conclusion that a university may act paternalistically when dealing with its students thus says nothing about whether an employer may act paternalistically when dealing with its employees. Moreover, the *Knapp* court suggested that there were limits to the degree to which even universities could make paternalistic decisions. See *Knapp*, 101 F.3d at 486 ("[H]ere, where Northwestern acted rationally and reasonably rather than paternalistically, no Rehabilitation Act violation has occurred.") Finally, the direct threat discussion was not even necessary to the decision in *Knapp*, which held that the plaintiff had failed to establish a protected disability, see *Knapp*, 101 F.3d at 482, and the university in *Doe* relied on the plaintiff's asserted risk to *others* as well as herself, see *Doe*, 666 F.2d at 777 ("The evidence in the record before us indicates that there is a significant risk that Doe will have a recurrence of her mental disorder, with resulting danger to herself and to others with whom she would be associated as a medical student.").

only that he *did not in fact* pose a risk to himself. See *id.* at 448 ("Moses maintains that as long as he followed instructions and worked 'downstream' from the equipment, there was no risk of harm."). Accordingly, the court simply stated, without any analysis, that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety." *Id.* at 447. In support of that assertion, the court cited 42 U.S.C. § 12113 and 29 C.F.R. § 1630.2(r). But it did not even acknowledge, much less attempt to address, the conflict between the statutory language, which does not incorporate a "threat to self" defense, and the regulation, which does. Such an unconsidered assertion, in a case in which the point appears to have been uncontested, is not the type of detailed, serious analysis that can create a meaningful split in the circuits. Indeed, it is not even clear that the Eleventh Circuit treats its *Moses* discussion as having resolved the question. See *Lowe v. Alabama Power Co.*, 2001 WL 286612 at *3 n.1 (11th Cir. Mar. 23, 2001) (expressly reserving the question "whether 29 C.F.R. § 1630.2(r) impermissibly expands the definition of direct threat provided by Congress in 42 U.S.C. § 12111(3)").

Second, the fact that *Moses* was litigated as a threat-to-self case appears itself to have been a fluke. The plaintiff in that case had epilepsy and worked at a job that placed him in close proximity to a variety of dangerous equipment. See *Moses*, 97 F.3d at 447-448. In at least one other case involving an employee with uncontrolled epilepsy in dangerous work settings, the same court that decided *Moses* has ruled that the employee presented a direct threat not just to himself but to others. See

LaChance, 146 F.3d at 836. Because the plaintiff in *Moses* conceded "that there was a significant risk that if he had continued working at American, he would have had seizures on the job," *Moses*, 97 F.3d at 447, there is every reason to believe that, in the dangerous setting in which he worked, he posed a threat to other individuals in the workplace. In any event, it should be clear that the Eleventh Circuit's decision in *Moses* did not involve the kind of purely paternalistic exclusion effected by Chevron here: firing an individual with a health condition that has absolutely no effect on the employee's ability to perform the job and that poses absolutely no risk to others in the workplace, simply because of a fear that – at some indeterminate point in the future – workplace conditions might pose a danger to the employee's health.

In the more than ten years since the ADA was enacted, this is the *only* case in which a court of appeals has been called upon squarely to address the question whether the statute's direct threat defense applies to such purely paternalistic decisions to exclude people with disabilities from employment opportunities. Of all the appellate cases cited by petitioner, in only one do the facts even purport to present this issue, and in that case the issue does not appear to have been contested and the employer's decision does not appear to have been purely paternalistic. The court of appeals' interpretation of the ADA's "direct threat" provision in this case thus does not create the kind of meaningful split regarding a significant, recurring issue that warrants plenary consideration by this Court.

B. There Is No Conflict In The Circuits Regarding Whether A Risk To Self Can Render An Individual Not "Qualified" Under The ADA

1. Title I of the ADA protects only "qualified individual[s] with a disability," 42 U.S.C. § 12112(a), which the statute defines as "individual[s] with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position[s] such individual[s] hold[ ] or desire[ ]," 42 U.S.C. § 12111(8). Petitioner argues (Pet. 13-14) that the Seventh Circuit's decision in *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999), held that risk to an employee's own health or safety can render that individual not "qualified" under the ADA. The decision below, petitioner contends, conflicts with that purported holding.

Petitioner misreads *Koshinski*. That decision involved an individual whose disability rendered him *presently unable* to perform the tasks of his job. Koshinski, whose job of "cupola operator" imposed exceptional physical demands, *id.* at 600, had a form of degenerative osteoarthritis that left him "in constant pain from which he could get no relief." *Id.* at 602. As the Seventh Circuit concluded, Koshinski's own detailed statements about his condition in an application for disability benefits "show[ed] Koshinski believed he could no longer operate the cupola." *Id.* at 603. And Koshinski "flat out admitted at his deposition that from February 5 through at least May 16, when he filed his application for disability benefits, he was incapable of meeting the rigorous demands of the cupola operator position." *Ibid.*

Koshinski thus held that an employee may not be "qualified" for a position where his disability causes him sufficient pain that he is no longer capable of meeting the physical demands of that job. But it did *not* hold that an employee who is fully capable of carrying out all job tasks may be deemed un-"qualified" based on the purely paternalistic concern that at some undetermined point in the future he may suffer harm in the workplace. To the contrary, the *Koshinski* court expressed its disapproval of such paternalistic discrimination. In response to Koshinski's argument "that the ADA is not a paternalistic statute designed to protect a disabled person from himself, and that an employee should not be fired or otherwise denied employment because he may become unwilling to do his job at some point in the future," the court accepted the legal premise but concluded that it did not fit the facts of the case (*ibid.*):

> In principle we do not disagree with Koshinski's argument. It would be hard to imagine, for example, that a court would sanction an employer's decision to fire a qualified employee simply because his degenerative heart disease makes a future heart attack inevitable. But here the record firmly established that Koshinski could not perform the essential functions of his job when the foundry decided to let him go.

This case, unlike *Koshinski*, is directly analogous to the hypothetical case of the employee with degenerative heart disease. Because *Koshinski* thus expressly distinguished the type of fact setting at issue here, it is not in conflict with the decision below.

2. Petitioner attempts to manufacture a circuit split by asserting that the decision below conflicts with cases in two circuits that held that the risk an employee poses to *others* may in some circumstances render that employee un-"qualified," wholly apart from any direct threat analysis. Pet. 14, 17 (citing *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000); *EEOC v. Amego, Inc.*, 110 F.3d 135, 142-144 (1st Cir. 1997)). But the court of appeals' opinion in this case did not disagree with those rulings. To the contrary, it properly deemed them "irrelevant" because they did not address employer claims that a possible future risk to an employee's *own* health or safety is sufficient to render that employee un-"qualified" under the ADA. Pet. App. 17a n.11. Contrary to petitioner's repeated assertion, the court of appeals in this case did *not* hold "that satisfying the demands of the 'direct threat' defense is the 'exclusive' way in which employers may take account of safety concerns." Pet. 17; see also *id.* at 21, 29. The decision below held *only* that "risk to self" cannot in and of itself render an individual un-"qualified." See Pet. App. 17a ("Given that not posing a risk to one's own health or safety cannot in itself constitute an essential job function, it is clear that Chevron's reason for refusing to hire Echazabal is not related to Echazabal's ability to perform the essential functions of the job for which he applied."). It accordingly created no conflict with cases like *Amego* and *Exxon* that held that a risk to *others* may in some circumstances render an individual unable to perform essential functions of a job, and hence render such an individual un-"qualified" for the job.

The absence of any conflict is clear from an examination of the *Amego* and *Exxon* cases. In *Amego*, the court

held that among the "essential functions" of the job of "team leader" at a residential facility for people with severe disabilities was the responsibility to "administer[ ] vital medications" to the facility's residents. *Amego*, 110 F.3d at 137, 144. The court concluded that the complainant's inability to be trusted to perform that function not only affected the residents' safety, but also rendered the complainant un-"qualified" to perform her job. See *id.* at 144 ("The precise issue here concerns the employer's judgment that Gugliemi could not be trusted to handle the medication-related functions of her job. In this case, a failure to perform an essential function – overseeing and administering medication – would necessarily create a risk to others."). The court of appeals' narrow ruling here – that an employer may not define the "essential functions" of the job to include the condition that performing the job not impose a risk on the *employee* – says nothing at all about the circumstances in which the "essential functions" of the job might, as in *Amego*, require attention to the safety of *others*.

Exxon, too, creates no conflict. There, the court held that the "direct threat" test applies only when "an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard" previously put in place by that employer. *Exxon*, 203 F.3d at 875. When an employer determines that an employee with a disability cannot satisfy a pre-existing "safety-based qualification standard[ ]" that is "applicable to all employees of a given class," *ibid.*, the court ruled, the employee will be deemed un-"qualified"so long as the "across-the-board" safety standard is "job-related and consistent with business necessity," 42

U.S.C. § 12113(a); see *Exxon*, 203 F.3d at 875. Applying this individual-decision/across-the-board-standard distinction, the court concluded that Exxon's rule that "permanently removes any employee who has undergone treatment for substance abuse from certain safety-sensitive, little-supervised positions" fell on the across-the-board-standard side of the line. Accordingly, the court remanded for application of the business necessity test. *Exxon*, 203 F.3d at 872, 875. But even if petitioner's decision to exclude respondent reflected application of some across-the-board requirement rather than an individualized decision (which is far from clear), *Exxon* holds only that courts must evaluate that decision under the "job-related and consistent with business necessity" test – *not* that courts must uphold that decision. For reasons we discuss in the next part, a purely paternalistic requirement that an employee have no condition that might pose risks to his or her health at some point in the future could not satisfy the "job-related and consistent with business necessity" test. Nothing in *Exxon* is to the contrary.

II. THE COURT OF APPEALS CORRECTLY INTERPRETED THE STATUTE TO BAR A "THREAT TO SELF" DEFENSE IN THIS CASE

Petitioner argues (Pet. 21-30) that the decision below reflects an incorrect interpretation of the relevant provisions of the ADA. Given the lack of any true conflict in the circuits, and the extremely small number of cases that have directly presented this issue, petitioner's argument

amounts to nothing more than a request for error correction that does not warrant plenary review by this Court. In any event, petitioner is wrong on the merits.

A. No Provision Of The ADA Permits An Employer To Exclude An Individual With A Disability From Employment Solely Because Of A Fear That, At Some Point In The Future, The Employee Might Experience Adverse Health Effects

As noted, this case involves an extremely narrow fact setting: an employer's decision to exclude an individual with a disability from employment solely because of a concern that, at some indeterminate point in the future, workplace conditions might cause harm to that individual. This case does not involve an employee who was presently unable to perform the job, nor even one for whom inability to perform the job was imminent. In these narrow circumstances, the court of appeals correctly held that no provision of the ADA permits the employer to exclude the employee with a disability. Pet. App. 4a-18a.

In defending its disability-based decision to exclude respondent, petitioner relies on three different provisions of the ADA. See Pet. 22. But none of these provisions can bear the weight petitioner places on it.

1. The first provision relied on by petitioner, the "direct threat" provision of 42 U.S.C. § 12113(b), is clearly unavailing. By its terms, that provision affords a defense only when the employee "pose[s] a direct threat to the health or safety of *other* individuals in the workplace." *Ibid.* (emphasis added). Given the absence of any reference in that provision to risks an employee poses to him-

or herself, the *expressio unius* canon must mean at least that the direct threat provision cannot of its own force provide a defense to an employer who excludes an employee with a disability on the basis of a feared "threat to self." The force of the *expressio unius* argument is particularly strong given the evidence, carefully canvassed by the court of appeals, that the omission of threats to self from the direct threat provision was anything but inadvertent. Pet. App. 7a-10a.

Petitioner seems to concede that the direct threat provision by its own force cannot justify the disability-based exclusion Chevron effected here. Petitioner appears to argue only that the limited scope of the direct threat provision does not foreclose an attempt to justify employee-safety-based discrimination under *other* provisions of the statute. Pet. 22-23. There are good reasons to doubt that petitioner's argument on this score is correct.[5] But the court of appeals had no need to – and did not – resolve this question, because it concluded that neither of the other statutory provisions on which petitioner relies supported its decision to exclude respondent from its refinery.

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[5] Because the direct threat provision, unlike the other provisions relied on by petitioner, specifically addresses safety-based exclusions, petitioner's argument is inconsistent with the canon of interpretation that holds that the specific controls the general. Under petitioner's argument, moreover, the direct threat provision would be superfluous, for there is no reason why an employee's risk to himself could render that employee un-"qualified" but the employee's risk to someone else could not do so as well.

2. Petitioner relies on two related provisions of the statute: Section 12112(a), which extends statutory protection only to a "qualified individual," 42 U.S.C. § 12112(a); and Section 12113(a), which permits an employer to impose "qualification standards" that are "shown to be job-related and consistent with business necessity," 42 U.S.C. § 12113(a). The court of appeals properly concluded that these provisions cannot support petitioner's disability-based exclusion of respondent.

Relying on the definition of "qualified" in Webster's Third New International Dictionary, petitioner contends (Pet. 23) that the ADA's "plain language" establishes "that danger to self may disqualify a person for employment." Whether or not the *Webster's Third* definition of "qualified" supports petitioner's position, the *ADA's* definition of "qualified" does not. The ADA defines a "qualified" individual as one who can perform the "essential functions" of his or her job. 42 U.S.C. § 12111(8). Thus, to show that respondent was not qualified *under the definition specifically set forth in the ADA*, petitioner cannot simply assert that a risk that an individual will suffer harm at some point in the future renders that individual "unfitted" for a job in some general sense. Cf. Pet. 23. Rather, petitioner must establish that respondent's ability to perform his job without posing a risk of harm to himself at some point in the future was an "essential function" of his job.

As the court of appeals correctly concluded, "not posing a risk to one's own health or safety cannot in itself constitute an essential job function." Pet. App. 17a. First, the risk that an employee might suffer harm at some

future point has nothing to do with that employee's present ability to perform the productive functions of the job. See Pet. App. 15a.[6] Second, in its case law rejecting paternalistic discrimination under Title VII of the Civil Rights Act of 1964 – a principal model for Title I of the ADA – this Court rejected an argument almost identical to petitioner's: "It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Air Lines is to fly planes without crashing." *Johnson Controls*, 499 U.S. at 207 (internal quotation marks omitted).[7] Third, the statutory finding that "overprotective rules and

[6] If the employee would plainly experience imminent harm that would prevent him or her from performing the productive functions of the job, the employer would be on much stronger ground in deeming that employee un-"qualified." But that is a far cry from petitioner's fear in this case that respondent might experience such debilitating harm at some indeterminate point in the future. See Pet. App. 17a-18a ("Echazabal worked for Irwin at the coker unit, performing work similar to the job for which he applied, long after he was diagnosed with hepatitis. There is no evidence that the health of his liver ever affected his ability to do the job.").

[7] See also *id.* at 206 ("We reiterate our holdings in [*Western Air Lines, Inc. v.] Criswell*[, 472 U.S. 400 (1985),] and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the 'essence' of the particular business."); *cf. Dothard*, 433 U.S. at 335 (stating that "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself" but upholding exclusion of women from certain prison guard positions based on the risk to general prison security).

policies" have constituted a significant means by which people with disabilities have experienced disadvantage, 42 U.S.C. § 12101(a)(5),[8] suggests that Congress would not have intended to permit employers to impose qualification standards that denied employment opportunities to people with disabilities "for their own good." For precisely the same reasons, a requirement that petitioner's employees have no disability that might in the future create a risk to their own health cannot be justified as a "qualification standard" that is "job-related and consistent with business necessity" under Section 12113(a).

3. Petitioner contends (Pet. 24-26) that the decision below creates "absurd consequences" by imposing an obligation on employers under the ADA that is inconsistent with federal and state workplace safety laws and state tort law. Petitioner is incorrect.

Petitioner points to several OSHA standards that specifically exclude people with particular identified disabilities from particular identified jobs (Pet. 25). To the extent that an employer relies on such a specific standard promulgated by a federal regulatory agency, this Court's decision in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570-578 (1999), would appear to shield the employer's decision from attack under the ADA. But petitioner cannot take advantage of that shield here, for it has never

[8] See also H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. 74 (1990) ("[E]mployment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals.").

purported to rely on any specific OSHA standard excluding people with hepatitis C from oil refinery jobs. Petitioner instead points to the Occupational Safety and Health Act's imposition of a general duty on employers to provide a safe workplace. Pet. 24-25. But the decision below does not prohibit employers from making workplaces safe for employees with disabilities. It simply bars them from doing so through the simple expedient of *excluding* employees with disabilities (at least outside the context, shielded by *Albertson's*, of a specific decision by OSHA that people with a particular identified condition cannot safely work in particular identified jobs). The assertion that this result places employers in an intolerable position is speculative at best; given the apparently small number of "threat to self" cases that have arisen under the ADA, the resolution of such a speculative conflict between statutes provides no reason for this Court to grant certiorari. The same point applies to the asserted conflict between the ADA and state workplace safety and tort laws (which state laws would, in any event, be preempted to the extent of any conflict, see Pet. App. 13a (citing *Johnson Controls*, 499 U.S. at 209-210)).

4. Petitioner argues (Pet. 24) that the court of appeals' decision is inconsistent with longstanding interpretations of the Rehabilitation Act. As we have explained, see pages 12-13 and n.4, *supra*, that is incorrect; the decision below creates no clear conflict with any other circuit's interpretation of the Rehabilitation Act's prohibitions on employment discrimination. Even if the decision below *were* inconsistent with pre-ADA interpretations of the Rehabilitation Act, however, that would be of no moment, for the ADA's text would appear to

reflect a congressional decision to *narrow* the scope of the safety-risk defense that might previously have been available under the Rehabilitation Act.

The Rehabilitation Act did not define the term "otherwise qualified individual," but implementing regulations promulgated by the EEOC in 1978 defined the term to mean an individual who "can perform the essential functions of the position in question without endangering the health or safety of the individual or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978). When it enacted Title I of the ADA in 1990, Congress made three crucial decisions. First, rather than simply rely on prior regulatory interpretations of the term, Congress added its own definition of "qualified individual." 42 U.S.C. § 12111(8). Second, Congress omitted any discussion of health or safety risks from that definition and instead defined the term solely by reference to the ability to perform a job's "essential functions." *Id.* And third, Congress added a separate "direct threat" provision, expressly denominated as a defense to liability, that spoke *only* of threats to "other individuals in the workplace." 42 U.S.C. § 12113(b). Even if prior constructions of the Rehabilitation Act would have permitted an employer to justify exclusion of an employee with a disability based on a fear that the employee posed a risk to him- or herself, these three changes clearly warrant a different result after enactment of the ADA.

B. The Court Of Appeals Properly Declined To Accord Deference To The EEOC's Manifestly Erroneous Interpretation Of The Direct Threat Provision

Petitioner argues (Pet. 28-29) that the court of appeals should have deferred to the EEOC's regulation that defines "direct threat" to include "a significant risk of substantial harm to the health or safety of the individual or others." 29 C.F.R. § 1630.2(r); accord 29 C.F.R. § 1630.15(b)(2).[9] The court of appeals properly declined to defer to this regulation, because it is inconsistent with the plain text of the statutory "direct threat" provision it purports to interpret (Pet. App. 11a-13a), as well as all of the other indicia of statutory meaning discussed above. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-126 (2000) ("[A]lthough agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, as well as the agency,

[9] Petitioner also relies (Pet. 28), on the EEOC regulation that defines "qualification standards" to include "physical, medical, safety, and other requirements" imposed by an employer. 29 C.F.R. § 1630.2(q). But that provision says nothing about whether an employer may impose "physical, medical, [or] safety requirements" regarding the risk an employee poses to him- or herself. On the face of it, there is no reason to read that regulation as referring to anything other than medical and safety standards, like that at issue in *Albertson's*, that are principally designed to protect the public. Because the regulations discussing the scope of the "direct threat" defense are the only ones in which the EEOC purports to authorize a "threat to self" defense, we focus our discussion on those regulations.

must give effect to the unambiguously expressed intent of Congress.' ") (quoting *Chevron*, 467 U.S. at 842-843).

Indeed, petitioner does not even attempt to defend the EEOC regulation as a proper interpretation of the direct threat provision in Section 12113(b) – even though on its face the regulation purports to define "direct threat," see 29 C.F.R. § 1630.2(r); accord 29 C.F.R. § 1630.15(b)(2). Rather, petitioner argues (Pet. 28-29) that the EEOC's expansion of the statutory "direct threat" provision is justified as an interpretation of the more general "qualification standards" language in Section 12113(a). But the EEOC has itself rejected an interpretation of the general "qualifications standards" language as encompassing safety risks. As this Court has noted, the EEOC has consistently interpreted the direct threat provision of Section 12113(b) as providing the exclusive means of justifying safety-based disability discrimination under ADA Title I. See *Albertson's*, 527 U.S. at 569 & n.15. In the *Exxon* case, the EEOC argued specifically (albeit unsuccessfully) that an employer could not justify safety-based discrimination under Section 12113(a)'s general "qualification standards" provision without engaging in an independent "direct threat" analysis. See *Exxon*, 203 F.3d at 873 (citing both the EEOC's litigating position and the interpretive guidance that accompanies 29 C.F.R. § 1630.15(b) and (c)). Ironically, although petitioner advocates deference to the EEOC's *regulation*, petitioner specifically rejects the EEOC's *interpretation* of the statutory provision on which Chevron purports to rely (Pet. 29-30).

Because the EEOC's regulation is inconsistent with the language of the statutory provision that regulation

purports to interpret, and the EEOC has denied the applicability of the statutory provision on which petitioner seeks to ground that regulation, the court of appeals properly declined to accord deference to the administrative interpretation in this case. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 174-175 (1989) (where regulatory "cost-justification" requirement could not be squared with the "subterfuge" language it purported to interpret in the Age Discrimination in Employment Act, Court would not defer to that requirement as an interpretation of "employee benefit plan" language it did *not* purport to interpret).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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